No. 15003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, A. F. L.,

Respondent.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

I.
STATEMENT OF THE CASE.

A. The Board's Findings Are Not Based Upon Any Substantial Evidence.

The Board, in reversing the trial examiner, found:

(1) That respondent Union operated the dispatch system in a discriminatory manner by:

(a) Giving preference in job referrals to its members;

(b) By *requiring* non-Union applicants to apply for membership in the Union immediately upon their first job referral;

(c) By imposing a weekly permit fee on non-Union members; and

(d) By removing Holderby's name from the "Members" list to the "Applicants and Others" list.

There is no evidence in the record to support the foregoing findings.

The agreement between the Union and the Associated General Contractors admittedly gave preference to workmen who had been employed within the multiple employer unit during the previous ten years. Accordingly, in compliance with this provision, the Union had an "Out of Work" list, but separately listed thereon "Members" (since they had worked in the multiple employer unit during the previous ten years), and had another heading: "Applicants and Others."

The Board, in reversing the trial examiner, held that the Union had given preference in job referrals to its members. The trial examiner, who heard the evidence, found that by operation of the Union security clause in the agreement, former employees of the A. G. C. would necessarily have become local 12 members and hence were eligible for preference. [Tr. p. 12.] This finding of the trial examiner is supported by the evidence, whereas the finding by the Board is not. The only evidence on the point is the testimony by Harold M. McNeel [Tr. pp. 143, 144]:

> "Q. The non-members, were they persons who had never worked, so far as you know, in the multiple employer unit? A. I don't know that any of them had.
>
> Q. You first dispatched the people under the contract, those that worked in the multiple employer unit within the period? A. That is correct."

The Board found, in reversing the trial examiner, that the Union required non-Union applicants to apply for membership immediately upon their first job referral,

This is not the evidence. The trial examiner found from the evidence that there was no requirement by the Union that a membership application be made by non-Union members upon the first job referral. He found [Tr. p. 13] as follows:

> "Nor is there any showing here that this signing was not with the individual employee's consent and for his individual convenience. Especially is this true in view of the testimony of the union official that he knew of men dispatched to jobs without having paid a 'dime' to the Union, although apparently there was also a 'practice' to have the employee pay a part of his initiation fee at the time of the referral. That practice may also well have been for the convenience of the man as well as the Union. In the absence of proof that the making of an application for membership and the payment of all or a part of the fee was a condition precedent to the referral to the job, the undersigned would be guessing and conjecturing if he held such an indefinite practice to be violative of the Act. Under the law, the undersigned is prohibited from accepting suspicion and conjecture in the absence of proof. The undersigned, therefore, on this record, must hold that the hiring hall and practice thereunder were legal under the Act."

Nowhere in the evidence does it appear that the non-members were *required* to sign an application.

The foregoing finding of the trial examiner that the Union did not require an application or a payment from non-members is amply supported by the record. [Tr. pp. 132, 133.] The witness McNeel testified:

> "Well, he would be cleared to the job and he would have, as the contract calls for, thirty days to become

a member according to the contract . . . I do know this, that it isn't absolutely necessary to do that (referring to payment). I know that men have been cleared without putting a dime on it. I do know that."

McNeel testified [Tr. pp. 69 and 70]:

"Q. In other words, your out of work list, as I understand it now and correct me if I'm wrong, is headed with your members and then below your members is another group which is headed transfers? A. Not below them, no.

Mr. Sokol: All in one?

The Witness: All, the heading is the same but they are not below because if they can't find a man on this list they go on down and it's all tied in, all printed on the same list.

. . . . . .

A. . . . there's a difference between the Applicants and Others list and the so-called information list because there is a provision in the National Labor Agreement that the men, called, I believe, a seniority clause, where they must have worked within the employer unit within the last ten years so the Applicants and Others and the information cards are set aside for that reason. They did not qualify for work within the employer unit under the master labor agreement."

The Board, further, found that the Union required non-Union applicants to pay a weekly permit fee. There is no testimony in the record to support this finding. It is true that the Constitution and Bylaws of the International Union refer to such a work permit fee, but there

is no evidence in the record that the respondent Union put work permit fees into effect.

With respect to the alleged discriminatory practice against Holderby, the Board, in reversing the trial examiner, found that Holderby's name had been removed from the "Members" list and put on the "Applicants and Others" list. There is no evidence of record showing that the mere removal of Holderby's name from one heading to another resulted in any discrimination against him. The trial examiner found that Holderby, after he became a member of the Union, worked for numerous contractors for periods of short duration, and in the winter of 1952 became delinquent in his dues and was suspended from membership in January, 1953. [Tr. p. 15.] The trial examiner found: "During this whole period of time, including that while suspended, Holderby was being referred to jobs regularly." [Tr. p. 18.] The evidence shows that at no time was Holderby told that he was not going to be given referrals by the Union. [Tr. p. 117.] No officer of the Union ever informed him that he would be deprived of work because of his name going from one list to another. [Tr. p. 117.] He was referred out to employment without discrimination. [Tr. pp. 18, 19, 21.] He himself conceded that on several occasions when he approached employers in the industry for work he was not hired for the simple reason that there was no work available. [Tr. p. 112.] His own testimony shows that he was employed in other fields during the period and had not made himself avail-

able for work. [Tr. pp. 95, 110.] He had been discharged many times and had been criticized for poor workmanship. [Tr. pp. 112, 120.] He testified [Tr. p. 118]:

> "Q. After June of 1954 did you get any referrals out of the Union and go out on jobs? A. Yes, sir."

Notwithstanding this evidence and contrary to the trial examiner's findings that there was no discrimination practiced against Holderby, the Board held that the removal of Holderby's name from the Contractual Preferred List because he had lost his Union membership was a violation of the Act because it denied him equal access to jobs. [Tr. p. 40.] This was an erroneous finding because Holderby remained, for all practical purposes, on the preferred list.

B. The Board Erred in Failing to Dismiss on the Ground of Lack of Jurisdiction.

As pointed out by the dissenting Board member, the Honorable Abe Murdock, employers alone are forbidden to discriminate against their employees *to encourage or discourage Union membership.* (Sec. 8(a)(3).) Unions, on the other hand, are forbidden under Section 8(b)(2) to cause or attempt to cause an employer to discriminate. Since no employer was joined in the action and since there was no showing that the Union caused or attempted to cause any specific employer to discriminate, the complaint should have been dismissed.

II.
ARGUMENT.

A. There Was No Substantial Evidence to Support the Board in Holding That the Practices of the Union in Dispatch of Employees Was Illegal.

The Board takes the position that the respondent Union gave preference in job referrals to its members. This it was entitled to do under the contract between it and the A. G. C., since the preference went to men who had been employed in the construction industry during the previous ten years. Obviously, all of such employees had to be members in view of the Union security provisions in the Industry, both in the current and prior agreements. Because of the Union security provisions, even under the Taft-Hartley Act, all employees had to become members after thirty days of employment. The trial examiner logically concluded [Tr. p. 14]:

> "As the contract required that all employees become members of the Union within thirty days of their employment by A. G. C. contractors, it is clear that only members of Local 12 would have worked for the A. G. C. contractors in the past ten years."

The Board claims that it was a discriminatory practice on the part of the Union to have two headings on its list of unemployed, that is, one headed "Members," and the other, "Applicants and Others." Certainly it was reasonable for the Union to devise this method so as to comply with the agreement, inasmuch as its members have worked for the A. G. C. employers within the prior ten years and were entitled to preference. It appears to be

the only logical way to differentiate between those who are entitled to preference and those who are not. The Board, however, claims that the transfer of the name of Holderby from the "Members" list to the head of the "Applicants and Others" list was discriminatory, but here again obviously, his name was put at the head of the "Applicants and Others" list, so that it would be readily available for dispatch to the job with preference, inasmuch as he had worked in the construction field, but since he had been suspended from membership, technically his name did not come under the "Members" roll. Despite this fact, however, the record is clear that he was dispatched to jobs with preference and without discrimination.

The Board claims that individuals who were not on the "Members" list and who were dispatched from the "Applicants and Others" list were required to apply for membership. Actually, the record does not support the finding that they were *required* to apply. They may have have applied, but voluntarily. As the trial examiner said [Tr. pp. 12, 13]:

> "There is nothing in the Act which deprives an employee of the right to apply for membership prior to the expiration of that thirty day period if he so desires. The fact that it was the 'practice' to have such an employee sign an application for membership at the time of his first referral is not proof that the signing of such an application for membership was a condition precedent to the securing of the referral."

The Board cannot refer to any evidence in the record that prospective non-member employees were either required or compelled or forced to sign an application be-

fore going to work and as a matter of fact, the signing of an application could well be for the benefit of the employee, since he, therein, set forth information as to his prior work so that he could be properly classified by the Union. [Tr. pp. 114, 145.]

The Board found, further, that non-members who were dispatched to work were required to pay a work permit fee. [Tr. p. 33.] Actually, there is no evidence whatsoever in the record to support a finding that the respondent Union required or compelled prospective non-member employees to pay a work permit fee. It is true that the trial examiner made such a finding, which was not excepted to. The reason that respondent did not except to any of the findings of the trial examiner obviously was that the trial examiner had recommended dismissal of the complaint and had concluded that the Union had not violated the Act in any respect, and necessarily respondent did not want to disturb such recommendations and findings. Whether the trial examiner found such to be the practice or not, the fact remains that there is no testimony or evidence of record showing that the Union did charge a work permit fee. Article XV, Section 3(e) of the International Union's Constitution requires a work permit fee of each hoisting or portable engineer or apprentice, but there is no evidence that such a requirement was put into practice by the respondent Union.

It, therefore, is clear that the findings of the Board that the respondent Union required applicants to apply for membership and imposed a weekly permit fee, are not based upon evidence, and since it appears that the Union properly gave preference to its members who had worked in the Industry during the prior ten years, there was no basis for the Board's finding that the respondent

caused employers to discriminate against non-Union applicants for employment to the advantage of Union members. [Tr. p. 38.]

B. There Was No Substantial Evidence to Support the Board's Holding of Discrimination Against Holderby.

The Board relies, in its reversal of the trial examiner, upon the fact that Holderby's name was removed from the "Members" list to the "Applicants and Others" list. Clearly, if Holdberby was not refused disptach to the job by the Union without discrimination, the mere fact that it removed his name from one list to the other would not of itself be a violation of the Act. There was ample reason for the Union to remove him from the "Members" list, since they no longer considered him a member, but the evidence shows distinctly that despite his removal from one list to the other he was ordered cleared for work. The trial examiner [Tr. pp. 137, 138] noted for the record that the Union had ordered Holderby cleared for work. The trial examiner found that the weight of the evidence did not support any finding that the Union discriminated against Holderby, because he was given every work opportunity. [Tr. pp. 18, 19, 20, 21, 22, 23 and 24.] The trial examiner said:

> "In order to prove discriminatory treatment as to Holderby it was incumbent upon the General Counsel to prove that there were jobs available for employees with Holderby's capabilities and, futhermore, that he, Holderby, was not referred to those jobs."

The trial examiner found that there was no evidence to support a finding that Holderby had been denied any jobs for which he was fitted.

But the Board, in reversing the trial examiner did so essentially upon the fact that he was transferred from one list to another, even though this did not result in denial of employment to him on an equal basis with other members.

C. The Board Erred in Failing to Dismiss, in View of the Fact That There Was No Evidence That the Respondent Union Caused or Attempted to Cause Any Employer to Discriminate Against Holderby or Any Other Employee.

Section 8(b)(2) of the Act provides:

> "It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of Subsection (a)(3), or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

The dissenting member of the Board said:

> ". . . Employers alone under Section 8(a)(3) are forbidden to discriminate against their employees to encourage or discourage union membership. Unions, on the other hand, are forbidden under Section 8(b) to (2) to 'cause or attempt to cause' such discrimination *by an Employer*. It is therefore completely outside the applicable proscription of this Section of the Act to find, as the majority does, that the Respondent Union discriminated 'against nonmembers of Local 12.' The fact that the Respondent Union may have referred one employee rather than another to prospective employers is not sufficient, in

my opinion, to prove that the Union *caused* a particular employer to engage in an act of discrimination. Indeed, the record in this case contains not the slightest evidence that any employer took any action or was induced or requested by the Union to take any action to the detriment of any employee. In this respect, at least, the *Boilermakers* case upon which the majority relies is entirely inapposite. There the court found that the 'record is clear that because the complainants were delinquent in union dues the *employers* refused to consider them on an equal basis with union men in good standing who were applying for such extra work as was available.' (Italics added.)

"The General Counsel does not contest the legality of the agreement between the Union and the contractors' Association whereby the Union agreed to refer applicants for employment to members of the Association. If, however, this contract is legal there is no act by any employer in this case which is even remotely related to discrimination against any employee. But the majority finds, nevertheless, that the Union caused the members of the Association to engage in acts of discrimination against employees and prospective employees. I am unable to determine from a reading of the majority's decision the basis of their conclusion that the referral practice of the Union, unauthorized under the terms of its contract with the Association constituted discrimination by members of the Association against employee applicants generally and Holderby in particular. If the majority is holding implicitly that the Union was acting as an agent of the Association in discriminating among applicants in violation of Section 8(a)(3), there is, in my opinion, no warrant for such a finding in this case. The only authorization extended to the Union by the Association was to refer applicants for em-

ployment in accordance with the terms of the contract which, as indicated above, is not alleged to be an unlawful agreement. Certainly, there is nothing in the common law rules of agency making members of the Association liable, as principals, for unauthorized acts of the Union, particularly where, as here, those acts are found to be in violation of a federal statute.

"I believe the majority has misread the language of Section 8(b)(2). The Statute clearly establishes that discrimination by an employer is a prerequisite to a finding of unlawful causation under Section 8(b)(2). In the instant case the majority's decision, in effect, converts discrimination by a Union into discrimination by an employer. In my opinion, this goes beyond the literal language of Section 8(b)(2) and the intent of Congress in its enactment.

"For these reasons I dissent."

III.
THE APPLICABLE LAW.

In order to uphold a finding that the Union has been guilty of an unfair labor practice, Section 10(c) of the Act requires that the finding be based upon "the preponderance of the testimony," and Section 10(e) states that the findings of the Board with respect to questions of fact shall be conclusive "if supported by substantial evidence."

As was said by the Court in *N. L. R. B. v. Sun Ship Building and Dry Dock Company,* 135 F. 2d 15 (C. C. A. 3; 1943):

> "It is our duty to accept as conclusive such of the Board's findings of fact as are supported by evidence. (*National Labor Relations Board v. Waterman Steamship Corporation,* 309 U. S. 206, 208) . . .

> the term 'evidence' as used in this connection means 'substantial evidence.' That is, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (*Consolidated Edison v. National Labor Relations Board*, 305 U. S. 197, 229), and affords 'a substantial basis of fact in issue can be reasonably inferred' (*National Labor Relations Board v. Columbian Enameling and Stamping Company*, 306 U. S. 292, 299.)"

But the Court in the *Sun Ship Building* case went on to say that:

> "The duty to find the facts does not carry with it the prerogative of raising suspicion to the status of fact or of basing inferences upon mere speculation."

And as was said by the Court in *Appalachian Electric Power Company v. National Labor Relations Board,* 93 F. 2d 985 (C. C. A. 4, 1938), the substantial evidence test

> ". . . is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."

The trial examiner, in holding that the dispatching practices of the Union were not illegal, said that he was prohibited from accepting suspicion and conjecture in the absence of proof. [Tr. p. 13.] The Board bases its order upon conjecture and inferences that are not founded upon proof of any kind. In *N. L. R. B. v. Swinnerton and Walberg Company*, 202 Fed. 511, this Court said:

> "Questions of credibility are generally for the trial examiner who has the opportunity to observe the demeanor of the witnesses."

It was the trial examiner who observed the demeanor of the witnesses and weighed the evidence, who concluded that there was no substantial evidence to support the charges.

We do not quarrel with the proposition laid down in the Board's brief that a Union violates the Act where either by written agreement or by practice it causes or attempts to cause an employer to engage in such discrimination. However, none of the cases cited are helpful in this connection because they all relate to discrimination or attempts at discrimination against the employees of specific employers.

The record in this case shows no proof of any attempted discrimination with respect to employees or prospective employees of any specific employer.

The Board (Board's Br. p. 13) states that the Union included in its preferred category for job referrals all members of Local 12 whether or not they had prior employment with A. G. C. members. This is an incorrect statement of the record because there is no showing by the Board that all of the members of Local 12 did not have prior employment with A. G. C. members. It appears that it would be incumbent upon the Board to prove to the contrary, that is, that not all of the members of Local 12 were entitled to the preference.

By the same reasoning, the Board's Brief, page 13, says that Holderby, who qualified for preference, was dropped from the preferred category once his Local 12 membership terminated. This is not the evidence, the Board did not establish this to be a fact, and the contrary was established—that is, that Holderby, although his name was transferred from one heading to another,

retained his preferred status and was dispatched to work. The Board further claims (Board's Br. p. 14) there was a practice of requiring non-Union members to apply for membership immediately upon their first job referral. Certainly, a voluntary act by the applicant for his own benefit is not in violation of the Act. The Act nowhere proscribes the voluntary signing of an application for membership upon referral to work.

It is argued that the position taken by the dissenting member of the Board is vulnerable, even though the Union did not cause or attempt to cause any specific employer to discriminate. The Board has held that Unions, as such, are non-profit organizations and are not engaged in a commercial venture within the contemplation of the Board's jurisdiction. (*Oregon Teamsters,* 113 N. L. R. B. No. 111, 36 L. R. R. M. 1408.)

The Board, in this case, is attempting to fix responsibility for violation of the Act upon an isolated incident involving the transfer of Holderby's name which is magnified out of all proportion to its importance where there was no showing that there was a scheme of discrimination by the Union.

This Honorable Court has said:

> "Even if this isolated incident did occur, to predicate a cease and desist order upon it is to magnify the inconsequential to the point where the action becomes an abuse of discretion. See Title 5, U. S. C. A., Section 1009(e)."
>
> *N. L. R. B. v. Meatcutters* Local, 202 F. 2d 671.

IV.
CONCLUSION.

We urge that enforcement of the Board's order be denied because no unfair labor practices by the Union have been established, since there was no evidence on which the Board could infer that the Union restrained or coerced employees in the exercise of their rights under the Act by compelling them to sign an application for membership before going to work or by compelling them to pay a fee or by discrimination against Holderby or any other person.

Respectfully submitted,

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